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No. 81-19

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL LEPPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's finding that the requisite impact on interstate commerce under the Hobbs Act had been established.

2. Whether the prosecutor impermissibly commented on petitioner's right to remain silent.

3. Whether incriminating statements voluntarily made by petitioner during a polygraph examination were admissible at trial.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) and the opinion of the district court (Pet. App. 4a-19a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on March 26, 1981, and a petition for rehearing was denied on May 5, 1981. The petition for a writ of certiorari was filed on July 2, 1981. the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of extortion, in violation of 18 U.S.C. 1951. He was sentenced to imprisonment for one year, all but three

months of which was suspended, and he was placed on probation for two years. The court of appeals affirmed.

Petitioner was a County Commissioner for York County, Pennsylvania. In February 1976 he extorted $300 from an architectural firm to help pay for a Florida vacation. The firm had recently been awarded a $388,391 contract with the county to design a new prison. The $300 payment to petitioner was initially made from a personal account that the firm's business agent, Charles Warner, used to make political campaign contributions on behalf of the firm (II Tr. 24-29; see W. Tr. 9-12, 21)[1]. Warner was reimbursed by the partners of the firm with partnership profits. The architectural firm engaged in business in states other than Pennsylvania and purchased goods in interstate commerce (W. Tr. 4, 7-8).

ARGUMENT

1. The Hobbs Act prohibits extortion that interferes with interstate commerce "in any way or degree." 18 U.S.C. 1951(a). *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Petitioner contends (Pet. 11-18) that the proof of interference was insufficient here because his extortionate payment was derived from the after-tax profits of the architectural firm, which he alleges would not have been used for the business. His claim is without merit.

Congress intended the Hobbs Act to reach as broadly as the Commerce Clause permits. *United States* v. *Culbert*, 435 U.S. 371, 373 (1978); *Stirone* v. *United States*, *supra*. Thus, a minimal depletion of the resources of a business engaged in interstate commerce satisfies this jurisdictional element. *E.g.*, *United States* v. *Calder*, 641 F. 2d 76, 78 (2d Cir.), cert. denied, No. 80-6291 (Apr. 20, 1981); *United States* v. *French*, 628 F. 2d 1069, 1075, 1078 (8th Cir.), cert.

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[1] "W. Tr." refers to the transcript volume entitled "Excerpt Testimony of Charles S. Warner."

denied, No. 80-479 (Nov. 3, 1980); *United States* v. *Cerilli*, 603 F. 2d 415, 424 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Summers*, 598 F. 2d 450, 454 (5th Cir. 1979); *United States* v. *Craig*, 573 F. 2d 513, 518 (7th Cir.), cert. denied, 439 U.S. 820 (1978). Whether the payment is made from pre-tax or after-tax dollars is a matter of accounting, irrelevant to the question in this case. In either case the firm's assets are diminished by the amount of the payment. Thus, whether the payment results in less personal income for the partners or less reinvestment income for the firm does not affect application of the Hobbs Act. Payment of the money could have reduced the firm's ability to make interstate purchases; the fortuitous circumstance that the money was assertedly paid from a fund maintained by after-tax dollars does not modify that potential impact. See *United States* v. *Staszcuk*, 517 F. 2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975).

Furthermore, the target of petitioner's extortionate demand was the firm, and not Warner individually, or the individual partners of the firm. Refusal to succumb to petitioner's demand could have adversely affected the firm's future business with the county. Such a reduction in government contracts would again, in turn, decrease the firm's need for interstate products. See *Stirone* v. *United States, supra; United States* v. *Summers, supra*, 598 F. 2d at 454. Finally, the extortion had the effect of corrupting a business that conducted its affairs in several states. *United States* v. *French, supra*, 628 at 1078.[2] The evidence was more than sufficient to support the jury's verdict in this case.

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[2]Petitioner's reliance (Pet. 14-16) on *French* is misplaced. In *French* the court held that (628 F. 2d at 1078) if the extortion involves an interstate enterprise, like the architectural firm in the instant case, then interstate commerce is directly affected, "whether this effect is characterized as extraction of a wrongful tribute by a local official from an enterprise, or as an infusion of corrupt practices into an interstate

2. Petitioner contends (Pet. 19-23) that in closing argument the prosecutor impermissibly commented on his assertion of his Fifth Amendment right to remain silent. See *Griffin* v. *California*, 380 U.S. 609 (1965). When viewed in context, however, it is apparent that the prosecutor's remark was not an impermissible comment. Cf. *Lockett* v. *Ohio*, 438 U.S. 586, 594-595 (1978). During a polygraph examination conducted prior to trial, petitioner answered questions concerning an alleged extortionate payment of $500 received from the architectural firm in September 1975.[3] But when asked about the February payment of $300, he asserted his Fifth Amendment privilege. In his opening statement at trial, defense counsel inaccurately summarized petitioner's admissions during the polygraph examination, indicating that petitioner had acknowledged receipt of the February payment, but thought it was only improper and not illegal (I Tr. 27-28). When the evidence showed otherwise (see III Tr. 170, 174, 178), the prosecutor, in his closing argument, sought to correct any misimpression that the jury may have received.[4] The prosecutor explained that petitioner had not admitted the February payment during his conversation with the FBI agent; instead, petitioner (IV Tr. 80):

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enterprise whose activities reach across state lines." Actual proof of diminished interstate activity was deemed unnecessary. In the long passage quoted by petitioner (Pet. 14-16; 628 F. 2d at 1076-1077), the court considered a question that it ultimately chose not to resolve, and thus the passage was dictum. Similarly, petitioner's reliance on the language in *United States* v. *Staszcuk*, 502 F. 2d 875, 879 (1974), rev'd in pertinent part, 517 F. 2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975), is misplaced. Thus, neither *French* nor *Staszcuk* supports a contrary result in this case or requires review of the issue by this Court.

[3]Petitioner was acquitted on a count charging this payment as a violation of the Hobbs Act, 18 U.S.C. 1951.

[4]Thus, contrary to petitioner's assertion (Pet. 21-23), the prosecutor's comment was not based on any fact outside the record.

> * * * was talking about campaign money. He was talking about September. He never even said anything to [the agent] about February and his vacation.

The prosecutor's comment did not equate petitioner's silence with guilt, but rather clarified the extent of petitioner's admissions to the FBI agent. It was an entirely appropriate response to defense counsel's erroneous opening statement. See also *United States* v. *Blanton*, 531 F. 2d 442, 444 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976); *United States* v. *Isaacs*, 493 F. 2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *Littlepage*, 450 F. 2d 944, 945 (9th Cir. 1971).[5]

3. Petitioner argues (Pet. 23-24) that his voluntary statements concerning the September payment should not have been admitted at trial because the jury probably inferred from his willingness to speak about the September incident that he (Pet. 24) "failed to discuss the February incident out of a consciousness of guilt." There is no authority for the proposition that the government may only use a confession if it relates to all of the offenses charged. No evidence was introduced at trial that petitioner had refused to answer any questions concerning the February payment. Compare *Anderson* v. *Charles*, 447 U.S. 404 (1980), with *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Consequently, the jury had no reason to assume, and no basis for inferring, that petitioner's failure to volunteer an explanation for the February incident was due to a consciousness of guilt.

Petitioner also argues (Pet. 23) that his admissions should not have been introduced because they were made during a polygraph examination, and therefore "the defense was precluded from fully cross examining the FBI agent

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[5]In addition, the court instructed the jury that no adverse inferences should be drawn from petitioner's failure to testify (J. Tr. 10). "J. Tr." refers to the transcript of the jury charge.

and from attempting to put the alleged statements in the proper context."[6] In fact, however, petitioner was fully able to question the agent about voluntariness, the length of the interrogation, any use of force, and whether petitioner's responses had been accurately recorded, without revealing that the confession was contemporaneously evaluated by a polygraph.[7] In any event, since these statements pertained solely to the count on which petitioner was acquitted, their admission could not have tainted his conviction for the February extortion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]The results of the polygraph examination were not introduced at trial.

[7]The district court conducted a lengthy pretrial voluntariness hearing to determine the admissibility of the statements.

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